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No. 90-67

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAY C. BUCKNER,
Petitioner,

vs.

CITY OF HIGHLAND PARK; HIGHLAND PARK POLICE DEPARTMENT; ROBERT BLACKWELL, TERRY FORD, Chief of Police; and JOHN HOLLOWAY, Lieutenant, Jointly and Severally,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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27 pp

QUESTIONS PRESENTED

I. WHETHER THERE EXISTS A CONFLICT BETWEEN *GARRITY* v. *NEW JERSEY*, 385 U.S. 493, 17 L.Ed 2d 562, 87 S. Ct. 616 (1967), AND *CLEVELAND BOARD OF EDUCATION* v. *LOUDERMILL*, 470 U.S. 532, 84 L.Ed 2d 494, 105 S. Ct. 1487 (1985)?

II . WHETHER THIS COURT SHOULD REVIEW THE COURT OF APPEALS' LEGAL DETERMINATION THAT THE REQUIREMENTS OF *LOUDERMILL* WERE MET WHEN PLAINTIFF, AFTER BEING PROVIDED WITH A COPY OF THE CHARGES AGAINST HIM, WAS ASKED IF HE WANTED TO RESPOND; HAD EIGHT FULL DAYS AFTER THAT INITIAL OPPORTUNITY IN WHICH TO RESPOND; AND DECLINED TO FILE A WRITTEN GRIEVANCE OR ASK FOR A MEETING WITH HIS SUPERVISORS WHEN APPROACHED BY HIS UNION REPRESENTATIVE?

III. WHETHER THIS COURT SHOULD EXPAND THE TRIPARITE ANALYSIS *LOUDERMILL* ESTABLISHED FOR PRE-TERMINATION DUE PROCESS TO ADOPT A NEBULOUS "BALANCING OF INTERESTS" TEST BASED ON AN EMPLOYEE'S LENGTH OF SERVICE WITH A PUBLIC EMPLOYER?

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The district court's Memorandum Opinion and Order is published at 681 F. Supp. 1256 (E.D. Mich. 1988). The court of appeals' decision is published at 901 F.2d 491 (6th Cir. 1990).

STATEMENT OF THE CASE

A. The Incident

Plaintiff Ray Buckner was a detective in the employ of the Highland Park Police Department.[1] In that capacity, Plaintiff was dispatched to the home of Letit Riley on November 6, 1984, who had filed a complaint against an individual in connection with a shooting incident. Plaintiff was responsible for the investigation of that complaint.

On his first visit to Ms. Riley's home, Plaintiff advised Ms. Riley that he failed to bring the proper forms for recording her statement. He informed Ms. Riley that he would return the following day. Plaintiff returned to Ms. Riley's apartment on November 7, 1984, at approximately 8:30 p.m., four hours after the end of his shift.[2]

Plaintiff gave Ms. Riley a witness complaint form to complete. As she was writing out her statement, he commented upon Ms. Riley's appearance, and began to question her sexual activities.

Then, as Ms. Riley stated:

> . . . I went back to write on the paper, Buckner reached out his right hand and put it up under my arm, grabbing — he was trying to grab my arm. Then he let go of my arm and I

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[1] The City of Highland Park is a municipal corporation incorporated under the provisions of the State of Michigan's Home Rule Cities Act, MCL §117.1 *et. seq.* None of the other Defendants are corporations or subsidiaries of corporations.

[2] Plaintiff could not recall the exact time of his arrival as he claimed he was too drunk.

> pulled away, and he rubbed his hands up against my breast. . . . When I looked back down to the paper to write again, he reached out his right hand and grabbed my head and was pulling my head toward him.

Ms. Riley demanded that Plaintiff leave her apartment, but he refused. Fortunately, she then received a telephone call from a friend, Mr. Lawrence Bohler. Plaintiff told Ms. Riley to have the person on the phone call later. Ms. Riley refused, put the receiver down and again asked Plaintiff to leave. Mr. Bohler could hear Plaintiff and Ms. Riley arguing as she repeatedly asked Plaintiff to leave. Finally, she was able to push Plaintiff out the door. After Ms. Riley told Mr. Bohler of the incident, he immediately telephoned the Highland Park Police Department to complain of Buckner's conduct.

B. Commencement of the Investigation

Immediately following the receipt of Mr. Bohler's complaint, the Chief of the Highland Park Police Department, William Ford, and the Lieutenant in charge of the Detective Bureau, John Holloway, were notified. Chief Ford and Lieutenant Holloway immediately proceeded to Ms. Riley's apartment and began an investigation into the complaint of Buckner's sexual misconduct. In addition to filing a complaint against Buckner, both Ms. Riley and Mr. Bohler gave written statements to Chief Ford on the evening of November 7, 1984.

C. Plaintiff's Knowledge of the Complaint

Plaintiff learned of Ms. Riley's complaint during the early morning hours of November 8, 1984, when he was contacted at his home by a friend, Detective Czarnecki, another Highland Park detective. After reporting to work in the morning of November 8, 1984, Plaintiff advised a fellow officer, Larry Robinson, about his assault of Ms. Riley. He told Robinson that he had done something the night before that he should not have done and that he was in trouble. When Robinson inquired further, Plaintiff stated, he had "messed with a woman." Later in the afternoon on November 8, 1984, after confirming that an official complaint for

sexual assault had been filed against him, and knowing that Chief Ford wanted to discuss the incident, Plaintiff opted to admit himself to Henry Ford Hospital for the claimed purpose of obtaining treatment for alcohol abuse. Plaintiff's medical records reveal, however, that he was never diagnosed as an alcoholic.[3]

D. Lieutenant Holloway's Visit to the Hospital

At approximately 6:30 p.m. on November 8, 1984, Lieutenant Holloway went to Henry Ford Hospital to interview Plaintiff.[4] To protect Plaintiff's rights under his Union's Collective Bargaining Agreement, Lieutenant Holloway also took Union Representative Officer Yopp to the hospital.[5] Before Lieutenant Holloway even began to question Plaintiff, Holloway permitted Plaintiff to consult in private with the union representative. Lieutenant Holloway then informed Plaintiff of the charges against him and asked for Plaintiff's version of what had happened at Ms. Riley's home. Upon the advice of Officer Yopp, however, Plaintiff refused to give his version of the events or otherwise to make any other statement. He was then provided the opportunity to read the complaint filed by Ms. Riley, but still refused to offer any explanation.

Lieutenant Holloway then suspended Plaintiff with pay, pending a further investigation of the charges. He once again asked Plaintiff if he had anything to say, but Plaintiff still refused to respond to the charges against him.

E. Officer Brookman's Visit to the Hospital

When Lieutenant Holloway was unable to obtain a statement from Plaintiff, Chief Ford requested that the Union President,

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[3] Testimony at Plaintiff's post-termination arbitration hearing revealed that Plaintiff's admitting diagnosis was actually "depression."

[4] Lieutenant Holloway indicated that the incident had the potential to result in criminal charges being filed against Plaintiff.

[5] Yopp's sole reason to be present was to provide Plaintiff with union representation during a disciplinary interview. *N.L.R.B.* v. *Weingarten*, 420 U.S. 251; 43 L.Ed 2d 171; 95 S. Ct. 959 (1975).

Officer Charles Brookman, advise Plaintiff of the charges against him and obtain his account of Ms. Riley's assault. Chief Ford also informed Officer Brookman of his intent to discipline Plaintiff.[6] Before November 15, 1984, Officer Brookman visited Plaintiff at the hospital in an attempt to obtain a statement, but Plaintiff still refused to make any statement about Ms. Riley's charges. Officer Brookman returned to the Police Department and informed Chief Ford that Plaintiff once again had refused to relate his version of the incident.

F. The Discharge

On November 15, 1984, following eight days of investigation and Plaintiff's continued refusal to relate whatever his side of the story might be, Chief Ford made a preliminary determination and recommended Plaintiff's discharge to Highland Park Mayor Robert Blackwell. Mayor Blackwell approved the discharge. A copy of the discharge recommendation was given to Officer Brookman in accord with the standard procedure of the Department.

G. The Grievance

It was not until he filed a written grievance, on November 29, 1984, challenging his suspension on November 8th and his

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[6] In the district court's opinion granting summary judgment to Plaintiff on the due process claim, the district court relied upon the affidavit of Officer Brookman which had been secured by Plaintiff's counsel. In particular, the district court accepted the affidavit of Officer Brookman and ignored the deposition testimony of William Ford who testified that before Plaintiff's discharge, he had advised Brookman of his intent to discipline Plaintiff and had sent Brookman to obtain Plaintiff's version of the Riley incident. The Brookman affidavit, which the district court credited, stated that Ford had never made such a directive. It further stated that Brookman did not visit Plaintiff in the hospital until after his discharge. But Brookman testified to the contrary at the post-termination arbitration hearing. At the time that Defendants sought a rehearing of the court's decision, they demonstrated that Officer Brookman's affidavit had been secured under the most questionable circumstances. Brookman told Plaintiff's counsel of the inaccuracy of several of the statements and was assured that they would be changed before it was filed. However, nothing was changed. Defendants filed an accurate Brookman affidavit which the district court simply ignored.

subsequent termination on November 16, 1984, that Plaintiff expressed any position. He filed the grievance pursuant to the grievance procedure contained in the Collective Bargaining Agreement between the City of Highland Park and the Highland Park Police Officers Association.[7] In that grievance, Plaintiff filed a general denial of the allegations contained in Chief Ford's termination letter. He also claimed that the City failed to provide him with procedural due process in discharging him.[8]

H. The Lawsuit

On March 10, 1986, Plaintiff filed a complaint alleging his discharge was in violation of his due process rights because no hearing was held before his termination. After a hearing on the parties' cross motions for summary judgment, the district court issued an Order on May 26, 1987, denying both parties' motions on the due process claim.

On June 26, 1987, the district court *sua sponte* ordered the parties to rebrief and reargue their motions for summary judgment on the due process claim "in light of the Sixth Circuit's recent opinion in *Duchesne* v. *Williams, et al.*, slip opinion No. 86-1017 (June 16, 1987)" [821 F.2d 1234 (6th Cir. 1987) *vacated* August 4, 1987]. The court also asked the parties "to specifically address the unresolved issue of the source of Plaintiff's alleged property right in his employment which would implicate the due process requirements of *Cleveland Bd. of Education* v. *Loudermill*, 470 U.S. 532 (1985)."

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[7] The grievance procedure, which contains five separate steps culminating in final and binding arbitration, was a mechanism available to Plaintiff and other Union members to obtain redress from alleged violations of the Collective Bargaining Agreement. One provision of the Agreement provided that employees, such as the Plaintiff, could not be disciplined or discharged without just cause.

[8] Plaintiff has never disputed that although he was given several opportunities to make a statement about the complaint filed by Letit Riley, he refused to do so upon all occasions. Plaintiff also admits that it was the sworn duty of police officers to uphold the law and the rights of citizens. He agreed that making sexual advances toward a complaining witness is a serious offense and grounds for termination.

I. The District Court's Opinion

After considering the parties' briefs and arguments, the district court found that Plaintiff had a property interest in his continued employment with the Highland Park Police Department (although, for purposes of the motion, Defendants did not dispute the existence of that interest). Relying on *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 84 L.Ed 2d 494, 105 S. Ct. 1487 (1985), it held that one of the sources of that interest was the Michigan Civil Service Act governing police and fire personnel, MCL §38.501 *et. seq.*, PA 78 ("Act 78"). Then, notwithstanding its acknowledgement that Lieutenant Holloway and Officer Yopp visited Plaintiff on November 8, 1984, and that Lieutenant Holloway had asked Plaintiff to give his account of the incident, the district court found the pretermination procedures provided to Plaintiff failed to satisfy the minimal constitutional requirements of the due process clause. In making this finding, the district court relied, in part, upon Act 78, despite the recognition by both the City of Highland Park and the Union representing Plaintiff that Act 78 did not even apply to the City's police and fire departments.

The court also awarded Plaintiff back pay from November 16, 1984, on the basis of the court of appeals' opinion in *Duchesne* v. *Williams*, 821 F.2d 1234 (6th Cir. 1987), even though that opinion had already been vacated by the court of appeals. The district court was particularly persuaded by the original, now vacated, opinion in *Duchesne*, because of what it perceived to be the similarities between the two actions.[9]

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[9] In *Duchesne*, the plaintiff, a public employee, claimed he had been denied due process in his termination because although he had a hearing, it was before the supervisor who discharged him, not an impartial decisionmaker. The court of appeals disagreed and held that *Loudermill* requires only the availability of a right to respond and nothing more. *Duchesne* v. *Williams*, 849 F.2d 1004 (6th Cir. 1988).

J. The Arbitrator's Decision

In the meantime, on January 5, 8, and 13, 1988, following multiple adjournments, an arbitration hearing was held upon the Plaintiff's grievance. Following extensive testimony and the submission of post-hearing briefs by the parties, Arbitrator Jerome H. Brooks issued a decision on April 28, 1988, finding that the City had discharged Plaintiff with just cause and denying Plaintiff's grievance.

The Arbitrator expressly considered and rejected the very arguments adopted by the district court. As stated by the Arbitrator:

> If under all the circumstances, [Plaintiff] was given notice of the accusations and evidence against him, *Loudermill* was satisfied no matter how informal the notice was to [Plaintiff]. Inspector Holloway, in his capacity as the City's agent, visited [Plaintiff] at Ford Hospital in the very early evening of November 8, 1984. [Plaintiff] was aware by that time that LR [Letit Riley] had filed a complaint against him and that a warrant against him was being sought. Indeed, a reasonable inference arises . . . that the precipitous nature of [Plaintiff's] decision to seek admittance to Ford Hospital on November 8 is attributable, at least in part, to his knowledge that he was in trouble because of the events in LR's apartment on November 7.
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> At the hospital, Holloway officially informed [Plaintiff] that LR had made a complaint against him and that a warrant was being pursued. During his cross-examination, [Plaintiff] admitted not only this, but also that Holloway showed him LR's complaint against him, and that he read it. This document detailed the evidence the City possessed that Grievant had engaged in wrongdoing.
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> Holloway read [Plaintiff] his *Miranda* rights and placed him on notice that the City intended to proceed criminally against him. However, it was unmistakable that [Plaintiff] was put on notice at the same time that the City was

pursuing disciplinary as well as criminal action against him. It was because of the potential affect on [Plaintiff's] employment status that the City arranged for his Union representative to be present during the meeting with Holloway. It should be remembered that Holloway indefinitely suspended [Plaintiff] during this visit and relieved him of his badge and weapon. Suspension signified that the City was pursuing disciplinary action against him. In my judgment as the result of Holloway's visit to the hospital, [Plaintiff] was aware of the gist of the charges against him and the evidence supporting them.

* * *

I conclude, on the basis of Holloway's meeting with [Plaintiff] on November 8 and Ford's fruitless efforts to arrange for a "hearing" of the type usually held with a Highland Park Police Officer and his Union representative when discipline is contemplated, that Grievant was informally apprised of the nature of the contemplated charges against him and the evidence supporting the charges, and had the opportunity to be heard before Chief Ford on all aspects of the matter.

K. The Court of Appeals' Decision

The Sixth Circuit Court of Appeals considered *de novo* the district court's award of summary judgment for Plaintiff under the standard for awarding summary judgment established in *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 91 L.Ed 2d 265, 106 S. Ct. 2548 (1986). The court of appeals reversed the district court's award of summary judgment for Plaintiff and vacated the award of back pay and attorney fees to him. *Buckner* v. *City of Highland Park*, 901 F.2d 491 (6th Cir. 1990). Instead, the court of appeals entered summary judgment for Defendants, holding that there was no genuine issue of material fact that Plaintiff was afforded the due process required under the *Loudermill* standard. 901 F.2d at 497.

The court of appeals held that the first two elements of *Loudermill* — notice of the pending charges and an explanation of the evidence against him — were met when Lt. Holloway presented Ms. Riley's complaint to Plaintiff to read. 901 F.2d at 495. The court of appeals held that the sole remaining issue under *Loudermill* was whether Plaintiff had been provided with an opportunity to respond to the charges against him. *Id.* Noting that the district court had ruled that union representative Brookman's visit to Plaintiff did not qualify as an adequate opportunity to respond, the court of appeals held that there was no genuine issue of fact to resolve because, as a matter of law, Lt. Holloway's initial interview afforded Plaintiff an adequate opportunity to respond. 901 F.2d at 494-95. The court of appeals reasoned that Brookman's visit merely offered Plaintiff another such opportunity. The court of appeals concluded that under *Loudermill*, the opportunity for a pre-termination hearing is only an initial check against an incorrect decision and that Plaintiff had received adequate pre-termination due process. *Id.*

SUMMARY OF THE ARGUMENT

Plaintiff's Petition for Writ of Certiorari must be denied by this Court because he has failed to meet any of the reasons described in Sup. Ct. R. 10.1 for granting such a petition. Plaintiff has not raised any argument that the court of appeals' decision conflicts with another decision by a federal appellate court or a state supreme court, or that the court of appeals made a significant procedural error during its deliberations. Sup. Ct. R. 10.1(a). In his Petition, Plaintiff has limited the purported basis for this Court to issue a writ of certiorari to Sup. Ct. R. 10.1(c), because of an alleged conflict between this Court's holdings in *Loudermill* and *Garrity* v. *New Jersey*, 385 U.S. 493, 17 L.Ed 2d 562, 87 S. Ct. 616 (1967) and a purported defect in the court of appeals' legal determination that Defendants had provided Plaintiff with the pre-termination due process required by

Loudermill.[10] Plaintiff also asserts, under Sup. Ct. R. 10.1(c), that this Court should consider expanding the *Loudermill* pre-termination analysis to include an unworkable, nebulous "balancing of interest" test based on an employee's years of service with the public employer. Because none of these arguments meet the criteria of Sup. Ct. R. 10.1(c), Plaintiff's Petition must be denied.

Loudermill clearly delineated the three elements of due process which must be afforded a public employee who has a property interest in his job. These elements are: (1) written or oral notice of the charges pending against him; (2) a brief presentation of the evidence discovered against him; and (3) an opportunity to respond to those charges. Plaintiff's Petition for Writ of Certiorari does not raise any significant issues under *Loudermill* which this Court must address. No conflict between different federal courts of appeals or between a state supreme court and a federal court of appeals over the interpretation of *Loudermill* has been cited by Plaintiff in his Petition for Writ of Certiorari. Plaintiff only argues that his Petition should be granted because of an alleged conflict between *Loudermill* and *Garrity* and because of his assertion that the court of appeals incorrectly interpreted *Loudermill*. In his Petition, Plaintiff has not cited to any precedent which adopts the position that these two cases are in conflict.

As correctly noted by the court of appeals, *Garrity* is inapplicable to the instant case and therefore, is not in conflict with *Loudermill*. *Garrity* establishes that a public employee may not be terminated for refusing to answer questions during a criminal investigation if those questions might incriminate him. No assertion is made in the instant case that Plaintiff was terminated for refusing to answer Lt. Holloway's questions or that he was threatened with termination if he failed to respond. Further,

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[10] S. Ct. 10.1(b), which governs review of decisions of a state supreme court, is inapplicable to the instant case.

Loudermill protects a public employee by affording him the opportunity, if he so chooses, to respond to the charges against him. *Garrity* and *Loudermill* are not in conflict — rather, they provide distinct protections to the public sector employee.

The court of appeals, in correcting the district court's errors of law, appropriately applied the three-part *Loudermill* test. No dispute exists that Plaintiff, a sworn police officer, read a written complaint filed by a woman whom he had sexually molested. Plaintiff was given the opportunity to respond to those charges by a management official, Lt. Holloway, and voluntarily elected not to take that opportunity to respond. After Lt. Holloway's visit, Plaintiff had eight days prior to his termination to respond to those charges, but elected not to do so until after his termination. He had an additional opportunity to respond to the complaint when he was visited by his union representative, Officer Brookman, who was sent by Chief Ford to solicit a union grievance. The court of appeals correctly determined that Plaintiff had been afforded the "minimal due process" *Loudermill* requires for a pre-termination hearing. Review of the court of appeals' decision is not warranted because that decision fully complies with *Loudermill.*

There is also no basis for this Court to grant Plaintiff's Petition to consider his self-serving proposal that the Court adopt a "balancing of interest" test to be added to *Loudermill's* tripartite analysis. While Plaintiff's proposal that high seniority public employees be given "more" pre-determination due process than junior public employees may serve his interests for this isolated matter, such a sliding scale is unsupported by constitutional precedent and would wreak havoc for lower courts and public employers who would have to apply such an ambiguous test. *Loudermill* has already established a workable three-part standard to apply to public employees who have a property interest in their employment. No reason exists in this matter for the Court to expand the *Loudermill* pre-termination test.

ARGUMENT

The sole issue before this Court is whether a Writ o. Certiorari should be granted to review the court of appeals' application of the due process requirements set forth in *Loudermill* to the undisputed facts of the instant case. Sup. Ct. R. 10.1(c). *Loudermill* clearly sets forth the three-part standard for the due process requirements for the pre-termination process applied to a public sector employee who has a property interest in his job: (1) the employee must receive written or oral notice of the charges pending against him; (2) he must be presented with a description of the evidence against him; and (3) he must be given an opportunity to respond to those charges. 470 U.S. at 546. In the instant case, the court of appeals correctly reversed the district court's errors of law and held that Defendants had afforded Plaintiff all the pre-termination due process to which he was entitled.

In its Petition for a Writ of Certiorari, Plaintiff only cites three reasons for its Petition to be granted. First, Plaintiff argues that the *Loudermill* due process requirements conflict with the constitutional protections afforded to public sector employees who are the subject of a criminal investigation, as delineated in *Garrity*. Second, Plaintiff argues the court of appeals erred in its application of the *Loudermill* standards to the undisputed facts of the instant case. Third, Plaintiff argues that this Court should expand the *Loudermill* pre-termination due process requirements for high seniority public employees. Significantly, Plaintiff does not raise *any* conflict in decisions between various federal courts of appeal or between a federal court of appeals and a state supreme court. Further, Plaintiff has not argued that the court of appeals made any procedural errors in rendering its decision. As the court of appeals correctly noted, *Garrity* is inapplicable to the instant case, and does not conflict with *Loudermill* because the court of appeals did not err in its application of *Loudermill*. Plaintiff's proposal for expanding the pre-termination due process requirements is unsupported by constitutional precedent or legitimate policy concerns. Plaintiff's Petition for Writ of Certiorari must be rejected.

I. There Is No Conflict Between This Court's Decisions In *Garrity* And *Loudermill* And Therefore No Review Of That Issue Is Warranted.

Petitioner asserts that this Court should grant its Petition for Writ of Certiorari to resolve a purported conflict between this Court's decisions in *Garrity* and *Loudermill*. However, because these decisions are not in conflict, review of the instant case is not warranted.

In *Garrity*, several police officers were being investigated about an allegation that they had fixed traffic tickets. 385 U.S. at 494. In accordance with a state statute, the police officers were advised that: (1) any statement made by them could be used against them in a criminal proceeding; (2) that they could refuse to answer questions, if answering those questions would tend to incriminate them; but (3) they would be terminated if they refused to answer the investigator's questions. 385 U.S. at 494. Forced with a choice between losing their jobs and possible incrimination, the police officers responded to the investigator's questions and were subsequently convicted of criminal charges, in part due to the statements they made to the investigator. 385 U.S. at 494-96. This Court invalidated the state statute, holding that the Fourteenth Amendment prohibited the use of statements made by a public employee in criminal proceedings against him where his statements were obtained under the threat of termination if he refused to answer the interrogator's questions. 385 U.S. at 499.

Thus, as noted by the court of appeals in its decision in the instant case, *Garrity* merely prohibits a public employer from terminating an employee for refusing to cooperate with a criminal investigation. 385 U.S. at 499; 901 F.2d at 496. There is also no dispute that after Lt. Holloway advised Plaintiff of his right to remain silent under *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694; 86 S. Ct. 1602 (1966), Plaintiff voluntarily elected to invoke that right. Defendants clearly had the right to seek an accounting from Plaintiff about his actions towards Ms. Riley. *Gardner* v. *Broderick*, 392 U.S. 273, 277, 20 L.Ed 2d 1082, 88 S.

Ct. 1913 (1968); *D'Acquisto* v. *Washington*, 640 F. Supp. 594, 622 (N.D. Ill. 1986).

While *Garrity* prohibits statements coerced by the threat of employment termination, *Loudermill* deals with an entirely different issue — the opportunity of a public employee prior to termination, if he so chooses, to respond to charges (including criminal charges) against him. 470 U.S. at 532. In *Loudermill*, this Court held that a public employee who has a property interest in his job must be afforded "minimal due process" prior to his termination. 470 U.S. at 545. To meet this minimal requirement, the public employee must be given: (1) written or oral notice of the charges against him; (2) a brief description of the evidence against him; and (3) an opportunity to respond to those charges. 470 U.S. at 546. *Loudermill*, as does *Garrity*, does not require the public employee to respond to criminal charges against him, but instead preserves the *option* for the employee to respond to those charges. Under *Loudermill*, an employee who elects not to respond, forces the employer to make a decision about termination without the employee's input and thus risks the employer making an "erroneous decision." 470 U.S. at 545; *Deretich* v. *Office of Administrative Hearing*, 798 F.2d 1147, 1150-51 (8th Cir. 1986) (an employee who chooses not to respond when offered the opportunity to do so, is responsible for the consequences of that choice). It is well-settled that the fact that Plaintiff failed to take advantage of the opportunity to respond does not give rise to a due process violation. *See Gniotek* v. *City of Philadelphia*, 808 F.2d 241 (3rd Cir. 1986), *cert. den.*, 481 U.S. 1050; 95 L.Ed 2d 839; 107 S. Ct. 2183 (1987); (police officers who elected to take their Fifth Amendment privilege after receiving *Miranda* warnings were given adequate pre-termination due process); *Darnell* v. *Dept. of Transp.*, 807 F.2d 943, 945 (Fed. Civ. 1986) (*Loudermill* only requires an opportunity to present the employee's story, not a guarantee of a presentation of facts); *Riggins* v. *Bd. of Regents*, 790 F.2d 707, 711-12 (8th Cir. 1986) (employee's voluntary choice not to follow an established grievance procedure does not create a due process violation by the employer); *Willoughby* v. *Village of Dexter*, 709 F. Supp. 781,

786 (E.D. Mich. 1989) (due process was afforded to a public employee who voluntarily elected not to testify at a pre-termination hearing); *D'Acquisto* v. *Washington*, 640 F. Supp. 594, 623 (N.D. Ill. 1986) (in evaluating police officers' decisions to remain silent under *Miranda*, the court held that "putting the individual to the choice between his opportunity to be heard and his privilege against self-incrimination is not an impermissible burden on his Fifth Amendment rights"); *Williams* v. *Seattle*, 607 F.Supp. 714, 721 (D.C. Wash. 1985) (police officer's failure to respond to a notice of pending discipline afforded him an adequate opportunity to respond).

As noted by the court of appeals, there is no allegation, as existed in *Garrity*, that Plaintiff was required to either respond to the police department's investigation or be terminated. 901 F.2d at 494. To the contrary, Plaintiff's decision to remain silent left the employer with the decision on whether to proceed on either criminal charges or employment termination proceedings, or both, based solely on the evidence it could obtain through its own efforts. No inherent conflict existed in the instant case in Defendants' application of the principles enunciated in *Garrity* and *Loudermill.*

In his Petition, Plaintiff does not cite to any precedent which holds that *Garrity* and *Loudermill* are in conflict, or that demonstrates that any lower court has had to balance the distinct constitutional protections afforded under those two decisions. Despite the arguments Plaintiff made to the courts below, the court of appeals held that *Garrity* is inapplicable to the instant case and the district court did not rest any part of its decision on *Garrity*. Plaintiff has not demonstrated, and Defendants are unaware of, any decision in conflict with the court of appeals' analysis of *Garrity* and *Loudermill.*

Plaintiff requests that this Court grant his Petition to consider a new rule which would allow a public employee to preserve his right to a *Loudermill* pre-termination hearing while a criminal investigation is pending. Such a rule would lead to an absurd result. Under Plaintiff's proposition, two police officers who face

potential termination on the same day, but for different reasons, would be treated differently. An employee who was faced with potential termination for excessive tardiness would receive no additional protection, while a co-worker, who is charged with aggravated assault and first-degree murder could not be removed from the public payroll until all criminal charges, including appeals, were resolved. Such a result is nonsensical and must not be entertained by the Court.

Because, as the court of appeals correctly noted, *Garrity* is inapplicable to the instant case, and because *Loudermill* does not conflict with *Garrity*, no review of this issue by this Court is warranted.

II. The Court Of Appeals Correctly Held That Plaintiff Was Given A Meaningful Opportunity To Respond To The Charges Levied Against Him.

The court of appeals correctly held that Plaintiff had a meaningful opportunity to respond to Riley's complaint and thus its decision is completely consistent with *Loudermill*.

Plaintiff was not in a "psychiatric ward" as suggested in his Petition and his subsequent entry into an Alcoholics Anonymous program after his termination is irrelevant. The court of appeals correctly held that Plaintiff had voluntarily admitted himself to the hospital, but that he was not diagnosed as suffering from alcohol abuse. 901 F.2d at 494. There is no allegation by Plaintiff, or any finding by either the district court or court of appeals to suggest that Plaintiff was inebriated either during Lt. Holloway's or Brookman's visits, was unaware of the charges against him, or was incapable of responding to the charges during the eight-day hiatus between Holloway's visit on November 8, 1984 and Mayor Blackwood's decision on November 15, 1984 to terminate him. The court of appeals correctly held that Plaintiff had a meaningful "opportunity to present reasons, either in person or in writing, [why] departmental discipline should not be taken." 470 U.S. at 546.

III. The Court Of Appeals Correctly Applied The *Loudermill* Analysis, Which Does Not Include A "Balancing of Interests" Test.

Plaintiff argues that his Petition be granted because he believes that the court of appeals erred in its application of *Loudermill* by failing to apply a "weighing test." *Loudermill*, however, does not require a "weighing test," but only an analysis of whether the three elements of pre-termination due process were met: (1) oral or written notice of the charges against the public employee; (2) a brief description of the evidence against him; and (3) an opportunity to respond to those charges. 470 U.S. at 546.

The court of appeals correctly applied this three-part test. The court of appeals held, and Plaintiff does not contest, that there was no dispute that the first two elements were met. 901 F.2d at 495. The court of appeals correctly noted that Plaintiff was given a copy of the complaint Riley filed against him and was told by Lt. Holloway that the police department was investigating that complaint. Plaintiff does not dispute this fact. Therefore, the sole issue is whether Plaintiff was given an opportunity to respond to the complaint. The court of appeals correctly applied the *Loudermill* principles by holding that Plaintiff had the opportunity to respond directly to Lt. Holloway, to file a grievance with union representative Brookman, or to contact the police department at any time during the eight days he was on suspension. 901 F.2d at 495-96.

The "weighing test" urged by Petitioner, does not apply to the analysis the court of appeals should have followed, but only to this Court's *rationale* for delineating the three required elements of pre-termination due process for a public employee. 470 U.S. at 544-45; *Gniotek*, 808 F.2d at 245.

Loudermill does not differentiate, as urged by Petitioner, between levels of the public employer's property interest. A police officer with twenty years of service, such as Plaintiff, does not have a "stronger" property interest than a police officer with two

years of service. *Loudermill* provides that the pre-termination hearing need not be "elaborate" and its sole purpose is to serve as an initial check against an erroneous decision. 470 U.S. at 543, 545. *Loudermill* does not require "more" pre-termination due process to be given to Plaintiff because of his years of service, only that he receive the minimal three elements of pre-termination due process. 470 U.S. at 546.

There has never been a dispute in this litigation that Plaintiff, by virtue of the Collective Bargaining Agreement which established the terms and conditions of his employment, had a property interest in his job. Further, the police department acted in accordance with *Loudermill's* suggestion of suspending a public employee who represents a "significant hazard" if retained on the job, by suspending him with pay while it continued its investigation and waiting for Plaintiff to respond to Riley's complaint. 470 U.S. at 544. Plaintiff was terminated only after he was afforded eight days to respond to Riley's complaint, which gave him an ample opportunity to respond.

Plaintiff has not cited to, and Defendants are unaware of, any constitutional precedent where individuals are afforded different levels of protection for the same constitutional right based upon the varying attributes of those individuals. While granting Plaintiff "more" due process protection, on a retroactive basis, because of his twenty years of service may conveniently serve Plaintiff's selfish interests, such a nebulous standard would prove unworkable for the lower courts and public employers to interpret and administer. Unlike the "bright line" three-part test already established in *Loudermill*, a "sliding scale" of increasing due process, based upon an employee's years of service, does not readily lend itself to an easily understood, national standard. There is no basis, either under a policy consideration or constitutional precedent, for this Court to consider the adoption of such an inherently problem-laden standard.

IV. The Court Of Appeals Correctly Held That Union Agent Brookman's Visit With Plaintiff Met The *Loudermill* Due Process Requirements.

Plaintiff also asserts its Petition should be granted because it argues that the court of appeals erred in holding that Defendants met their due process requirements by directing union representative Brookman to visit Plaintiff and solicit a grievance.

The court of appeals correctly held that Brookman's attempt to solicit a grievance or otherwise advise Plaintiff that he should respond to the charges Riley made against him, at least in part, met Defendants' due process requirements. Brookman's solicitation of a grievance did provide Plaintiff with an opportunity to respond to the charges against him — that is precisely the purpose of a union grievance.

Plaintiff's assertion that "grievances are notoriously brief" is nonsensical, not only because there is no evidence on the record that Plaintiff was limited in the length of the grievance he could file, but because, in practice, grievances do vary in length and detail. F. Elkouri & E. Elkouri, *How Arbitration Works*, 4th ed. 153-175 (1985). Brookman had a duty, on behalf of the union, to adequately represent Plaintiff in the investigation and preparation of the grievance. *Vaca* v. *Sipes*, 386 U.S. 171, 177, 191; 17 L.Ed 2d 842; 87 S. Ct. 903 (1967). Plaintiff could have, but chose not to, responded to Riley's complaint by filing a grievance over his suspension.

Further, the court of appeals correctly interpreted *Loudermill* in holding that Lt. Holloway's meeting with Plaintiff in the presence of union agent Yopp, *alone* met the minimal due process requirements. 901 F.2d at 495. Brookman's visit merely gave Plaintiff a "second bite" at the "opportunity to respond" apple. Thus, whether Brookman's visit afforded Plaintiff an opportunity to respond is irrelevant to the ultimate disposition of this case because Plaintiff had an opportunity to respond either directly to Lt. Holloway or at any time during the eight days before his termination by Mayor Blackwood.

In reaching its conclusion that Plaintiff had an opportunity to respond, the court of appeals correctly dismissed Plaintiff's unsupported argument that he was incapable of responding:

> When Officer Brookman visited Buckner [Plaintiff], [Plaintiff] inquired about the charges against him and Brookman's discussions with Chief Ford regarding those charges. Plaintiff was not suffering from any mental or physical disability which prevented him from offering his response to the Complaint.

901 F.2d at 495.

This Court need not decide which party Brookman was acting for when he met with Plaintiff to solicit a grievance. Regardless of whether Brookman was acting as the City's agent or as Plaintiff's agent as a union representative, the court of appeals correctly held, under *Loudermill*, that when a union representative advises a public employee that charges are pending against him and provides him an opportunity to respond, either through the solicitation of a grievance or any other means, the minimal pre-termination due process requirements of *Loudermill* are met.

The nature of Brookman's visit to Plaintiff does not warrant review of this litigation by this Court, because the court of appeals did not commit legal error. Even if Brookman's visit is disregarded in the due process analysis, Plaintiff was afforded adequate pre-termination due process.

CONCLUSION

Because this Petition involves neither questions which should be, but have not, been settled by this Court, or an appellate court decision in conflict with this Court's decision in *Loudermill*, the Court should decline to issue a Writ of Certiorari.

Respectfully submitted,

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